

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

be futile. *See, e.g., Ouedraogo v. A-1 Int'l Courier Serv., Inc.*, No. 12-CV-5651 (AJN), 2013 WL 3466810, at *6 (S.D.N.Y. July 8, 2013). An amendment is not “futile” if it could withstand a motion to dismiss under Rule 12(b)(6). *See, e.g., Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012); *Agerbink v. Model Service LLC*, 155 F. Supp. 3d 448, 452 (S.D.N.Y. 2016). Put differently, a proposed claim is futile if, accepting the facts alleged by the party seeking amendment as true and construing them in the light most favorable to that party, it does not “plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

According to Plaintiff, Sergeant Marmolejos should be added as a defendant because he violated DOCCS Directives by either: (1) not filming his entire transport from MCC to Sing Sing, or (2) failing to ensure the video was not partially erased or manipulated. (ECF 74 at 3). As Defendants properly assert, a violation of DOCCS Directive does not rise to the level of a Constitutional violation. (ECF 76 at 2, citing *Gunn v. Bentivegna*, No. 20-CV-2440 (LLS), 2020 WL 2571015, at *3 (S.D.N.Y. May 19, 2020)). Accordingly, Plaintiff’s request to amend the Complaint a third time to add Sergeant Marmolejos as a defendant is **DENIED** as futile.

Defense counsel is directed to meet and confer with Plaintiff and file a status update as to any outstanding discovery that must be done, and what additional efforts Defendants have made to locate the video footage that Plaintiff asserts is missing.

The Clerk of Court is respectfully requested to mail a copy of this Order to the *pro se* Plaintiff.

SO ORDERED.

Dated: February 11, 2022
New York, New York

s/ Ona T. Wang

Ona T. Wang
United States Magistrate Judge